FILE COPY

FILED
OCT 2 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1939

No. ORIGINAL

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,

v.

THE STATE OF MISSOURI ET AL.,
Respondents.

BRIEF FOR RESPONDENT THE STATE OF MISSOURI ON THE JURISDICTION OF THE COURT.

ROY MCKITTRICK,
Attorney General of the
State of Missouri.

EDWARD H. MILLER,
Counsel for Respondent
State of Missouri.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
POINT I:	
The Court cannot take jurisdiction, as this proceeding is outside the judicial power	5
A. There is no justiciable "case" or "controversy"	6
(1) A request for an opinion does not present a case or controversy	7
(2) The supposed dispute is political and therefore not justiciable	10
B. There is no case or controversy between States.	13
(1) There is no direct conflict of interests between the States	13
(2) Missouri is not threatening any private or property right of Massachusetts	15
(3) Massachusetts is not the real party in interest	16
C. If there is a separate controversy between a State and citizens of another State, necessary parties are absent, whose joinder would oust the jurisdiction	19
D. The allegations afford no adequate basis for relief according to accepted doctrines of equity jurisprudence	22
POINT II:	
Even if the Court has jurisdiction it may decline to exercise it	24
A. Courts need not in every case exercise a jurisdiction which they admittedly possess	24
B. The Constitutional provision conferring jurisdiction in controversies between States, and between States and citizens of other States, is not mandatory	26

POINT III: Page

If the Court has discretion to decline to exercise jurisdiction it should decline to exercise it in this case 31

A. The spirit in which interstate litigation should be approached 31
B. This proceeding is not of the kind for which the original jurisdiction of this Court was designed 34
C. There are other entirely adequate remedies available to the interested parties 37

CONCLUSION 41

APPENDIX 42

TABLE OF AUTHORITIES CITED.

1. Cases:

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 (1937) 6
Alabama v. Arizona, 291 U. S. 286 (1934) .3, 9, 32, 36, 38
Ames v. Kansas, 111 U. S. 449 (1884) 6, 27n, 28
Arizona v. California, 283 U. S. 423 (1931) 9
Arizona v. California, 292 U. S. 341 (1934) 32, 36
Arizona v. California, 298 U. S. 558 (1936) 19
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936) 9
California v. Latimer, 305 U. S. 255 (1938) 34, 38
California v. Southern Pacific Co., 157 U. S. 229 (1895) 5, 19, 34, 37
Canada Malting Co. v. Paterson Steamships, Ltd., 285 U. S. 413 (1932) 25
Case of the State Freight Tax, 15 Wall. 232 (1872) 16
Chicot County v. Sherwood, 148 U. S. 529 (1893) .. 24
Chisholm v. Georgia, 2 Dall. 419 (1793) 29
Clark v. Wooster, 119 U. S. 322 (1886) 3
Cohens v. Virginia, 6 Wheat. 264 (1821) 24, 41
Connecticut v. Massachusetts, 282 U. S. 660 (1931) . 33
Curry v. McCanless, 307 U. S. 357 (1939) 3, 23, 39
Douglas v. New York, New Haven, & Hartford R. R. Co., 279 U. S. 377 (1929) 26
Ex Parte Young, 209 U. S. 123 (1908) 38
Florida v. Anderson, 91 U. S. 667 (1875) 18

Page

Fowler v. Lindsey, 3 Dall. 410 (1799) 10
Georgia v. Stanton, 6 Wall. 50 (1868) 10, 15
Graves v. Elliott, 307 U. S. 383 (1939) 3, 39
Hans v. Louisiana, 134 U. S. 1 (1890) 29, 30, 36
Hyde v. Stone, 20 How. 170 (1858) 24
Iowa v. Slimmer et al., 248 U. S. 115 (1918) 36
Kansas v. Colorado, 185 U. S. 125 (1902) 11, 16, 35
Kansas v. United States, 204 U. S. 331 (1907) 18
Kentucky v. Dennison, 24 How. 66 (1861) 32
Kentucky v. Indiana, 281 U. S. 163 (1930) 35
Louisiana v. Texas, 176 U. S. 1 (1900) 5, 6, 18, 32, 34, 36, 40
Marbury v. Madison, 1 Cr. 137 (1803) 6, 7
Massachusetts v. Mellon, 262 U. S. 447 (1923) 8, 11
McClellan v. Carland, 217 U. S. 268 (1910) 24
McCulloch v. Maryland, 4 Wheat. 316 (1819 16
Mills v. Green, 159 U. S. 651 (1895) 3
Milwaukee County v. M. E. White Co., 296 U. S. 268 (1935) 37, 41
Minnesota v. Northern Securities Co., 184 U. S. 199 (1902) 21
Minnesota v. Wisconsin, 252 U. S. 273 (1920) 40
Mississippi v. Johnson, 4 Wall. 475 (1867) 32
Missouri v. Illinois, 180 U. S. 208 (1901) 16, 34, 35, 36
Muskrat v. United States, 219 U. S. 346 (1911) 7, 14
Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U. S. 249 (1933) 17
New Hampshire v. Louisiana, 108 U. S. 76 (1883) 18, 35
New Jersey v. Pennsylvania, 287 U. S. 580 (1933) 14
New Jersey v. Sargent, 269 U. S. 328 (1926) 8
New York v. Connecticut, 4 Dall. 1, 3, 6 (1799) 34
New York v. Louisiana, 108 U. S. 76 (1883) 18, 35
New York v. New Jersey, 256 U. S. 296 (1921) 32, 40
North Dakota v. Chicago & Northwestern Railway Co., 257 U. S. 485 (1922) 33
North Dakota v. Minnesota, 263 U. S. 365 (1923) 18, 33, 36
Oklahoma v. Atchison, Topeka and Santa Fe Railway Company, 220 U. S. 277 (1911) 15, 16, 17
Oklahoma v. Cook, 304 U. S. 387 (1938) 33
Oklahoma v. Gulf, Colorado & Santa Fe Ry. Co., 220 U. S. 290 (1911) 17, 28, 29

Page

Penn v. Lord Baltimore, 1 Ves. 444 (1750) 34
Pennsylvania v. Quicksilver Company, 10 Wall. 553 (1871) 5, 27
Pennsylvania v. West Virginia, 262 U. S. 553 (1923) 9, 20, 32, 36
Pennsylvania v. Wheeling Bridge Co., 13 How. 518 (1852) 31
Pennsylvania v. Williams, 294 U. S. 176 (1935) ... 25
Principality of Monaco v. Mississippi, 292 U. S. 313 (1934) 29
Rhode Island v. Massachusetts, 12 Pet. 657 (1838) 11, 34, 35
Rice & Adams Corporation v. Lathrop, 278 U. S. 509 (1929) 3
Rogers v. Guaranty Trust Company of New York, 288 U. S. 123 (1933) 25
Second Employers' Liability Cases (Mondou v. New York), 223 U. S. 1 (1912) 24, 26
South Carolina v. Georgia, 93 U. S. 4 (1876) ... 35n
South Dakota v. North Carolina, 192 U. S. 286 (1904) 20, 34, 35, 41
Texas v. Florida, 306 U. S. 398 (1939) 3, 12, 13, 22, 24, 31, 36, 37, 41
Texas v. Interstate Commerce Commission, 258 U. S. 158 (1922) 8, 21
Texas v. New York, 300 U. S. 642 (1937) 13
The Providence Bank v. Billings, 4 Pet. 514 (1830) 16
United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466 (1916) .. 3
United States v. Louisiana, 123 U. S. 32 (1887) .. 27n
United States v. Texas, 143 U. S. 621 (1892) 28, 31
United States v. West Virginia, 295 U. S. 463 (1935) 7, 15
Virginia v. West Virginia, 11 Wall. 39 (1871) 10
Virginia v. West Virginia, 206 U. S. 290 (1907), 220 U. S. 1 (1911) 246 U. S. 565 (1918) .. 32, 34, 35, 40
Washington v. Oregon, 214 U. S. 205 (1909) 40
Washington v. Oregon, 297 U. S. 517 (1936) 33
Williams v. United States, 289 U. S. 553 (1933) .. 6, 28, 29, 30

Page

Wisconsin v. Pelican Insurance Co., 127 U. S. 265 (1888) 16, 30, 37
Worcester County Trust Co. v. Riley, 302 U. S. 292 (1937) 39

2. Constitution of the United States:

Article III, Section 2 ..... 5, 6, 17, 25, 26, 27, 29
Eleventh Amendment 18, 29

3. Statutes:

Judiciary Act (Sept. 24, 1789, c. 20, sec. 13, 1 Stat. 80) 5, 6, 27n, 29
Judicial Code, sec. 24, as amended; 28 U. S. C. A. sec. 41(3) 25
Judicial Code, sec. 233; 36 Stat. 1156; 28 U. S. C. A. sec. 341 ..... 5, 6, 17, 27, 27n
Revised Statutes of Missouri, 1929, sec. 598..... 39
General Laws of Massachusetts (Tercentennary Edition, 1932) c. 65, secs. 6, 25 ..... 38, 39
Missouri Declaratory Judgment Act, Laws of Missouri, 1935, pp. 218-220 38

4. Miscellaneous:

Wm. C. Coleman, *The State as Defandant under the Federal Constitution*, 31 Harvard Law Review 210 34
Cooley on Taxation, 3rd Edition, p. 7 16
Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale Law Journal 685 ..... 34, 40
Hughes, *Federal Practice*, sec. 3021n 27n
James Brown Scott, *Judicial Settlement of Controversies between States of the American Union*, Oxford University Press (1918), Oxford as the Clarendon Press (1919) 34n

Supreme Court of the United States

OCTOBER TERM 1939

No. ORIGINAL

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,

v.

THE STATE OF MISSOURI ET AL.,
Respondents.

BRIEF FOR RESPONDENT THE STATE OF MISSOURI ON THE JURISDICTION OF THE COURT.

STATEMENT OF THE CASE.

This is an original proceeding instituted by the Commonwealth of Massachusetts against the State of Missouri, and three citizens of Missouri as trustees of *inter vivos* trusts created by a decedent who died domiciled in Massachusetts. The trustees all reside in Missouri, and the trust assets are now and have been continuously there. The trust instruments provide for gifts over, after the death of the settlor, to residents of both Missouri and Massachusetts. The Bill of Complaint alleges that both Massachusetts and Missouri claim the right to levy their respective inheritance taxes on

the transfers, and prays that the Court will determine which of the States can, consistently with the Constitution of the United States, rightfully levy such taxes.

The details in connection with these primary facts are set out in the pleadings, and counsel for the State of Missouri have undertaken a statement of the case only to call attention to two matters, one a conclusion in the Massachusetts statement of the case, and the other an explanation of the inconsistency between Missouri's pleading and its brief.

In the brief for the Commonwealth of Massachusetts, counsel say on page 3 that Missouri "intends to exercise its jurisdiction over the trustees and the property, to the exclusion of Massachusetts and its claim." The Bill of Complaint does so allege (p. 14), but the Return of Missouri to the Court's Rule to Show Cause does not indicate any intent to act so as to interfere with the efforts of Massachusetts to collect a tax from the trustees. Missouri has pleaded in the alternative, denying the jurisdiction of Massachusetts to tax, but averring that whether Massachusetts has or has not jurisdiction to tax, the State of Missouri has the right to impose its taxes (pp. 3-4). Obviously this alternative position was taken so as to assert Missouri's right to tax, whether the Court should declare that only one or that both States could levy their taxes. In the event of the latter declaration, the Missouri pleading suggests the plain inference that Missouri has no quarrel with the right of Massachusetts to tax, in the event both States may tax. And in the other alternative, Missouri's hostility to the Massachusetts tax would only be manifested by the weapon of legal argument, and not be restrictive or coercive control over the trustees or the trust *res*. That is all the Massachusetts allegation, even in the absence of the Missouri Return, can properly be construed to mean.

There is, however, a complete variance between the position taken by the State of Missouri in its pleading on the jurisdictional question, and its position in this brief on that question. Responding to the Court's Rule to Show Cause

why leave should not be granted to file the Bill, Missouri stated that it had no cause to show.

In October of 1938, when Massachusetts instituted this proceeding, Massachusetts asked this Court to declare that it had jurisdiction to tax these transfers, because such right was then in doubt. The situation has changed since then. That both States have the constitutional right to tax transfers such as these has now been settled by decisions of this Court. *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939). Since the right of Massachusetts to levy its taxes is now already established, Massachusetts no longer needs the only relief asked for in its Bill of Complaint. And that the Court does not propose to consider the merits of the case at this time is made plain in its Order of June 5, 1939, limiting the argument "to the question whether this Court has jurisdiction to entertain the suit."

Under these circumstances Missouri conceives its duty to lie in an adversary argument on the jurisdictional question. The Court has announced its duty to inquire into its own jurisdiction whether the jurisdiction is questioned by the parties or not, *Texas* v. *Florida*, 306 U. S. 398 (1939), and since the Bill could have been dismissed summarily because of no cause of action stated, *Alabama* v. *Arizona*, 291 U. S. 286 (1934), or on the theory that the case had become moot, *Mills* v. *Green*, 159 U. S. 651 (1895), *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466 (1916), Missouri assumes that the Court desires to hear argument on both sides of the jurisdictional question, regardless of the position heretofore taken in the pleadings.

That jurisdiction is determined in the light of the facts and situation existing at the date of the institution of the suit seems clear. *Texas* v. *Florida*, *supra*; Cf. *Clark* v. *Wooster*, 119 U. S. 322 (1886); *Rice & Adams Corporation* v. *Lathrop*, 278 U. S. 509 (1929). Thus this brief will treat the jurisdictional question from the point of view of the

situation existing at the date of the institution of the suit, when the Commonwealth of Massachusetts was asking this Court, as the sole relief prayed for, to determine an important, doubtful question of constitutional law, namely, whether Massachusetts or Missouri had the right to impose its State inheritance taxes with respect to the transfers described in the Bill of Complaint.

SUMMARY OF ARGUMENT.

The Court cannot take jurisdiction, as no justiciable case or controversy to which the judicial power is extended under the Constitution, is presented, but rather a request for an opinion, on a political aspect of sovereignty. The States named as parties are not true adversary parties in the required sense, and no cause of equitable cognizance is stated in the Bill of Complaint. If a controversy does exist between Massachusetts and certain Missouri citizens, indispensable parties respondent are lacking, whose joinder would oust the Court's jurisdiction.

Even if the Court could take jurisdiction, it need not do so. Certain kinds of cases have been carved out of the general proposition that a court has no discretion to decline to exercise a conferred jurisdiction, and constitutional and statutory provisions relevant to the grant of original jurisdiction are neither all-comprehensive nor mandatory. And if the Court may decline to exercise its jurisdiction, it should so decline here. This is not the type of case for which the grant of original jurisdiction was designed, and the interested parties have other entirely adequate remedies in other courts.

ARGUMENT.

I.

The Court Cannot Take Jurisdiction, as This Proceeding is Outside the Judicial Power.

Article III, section 2 of the Constitution of the United States provides in part as follows:

Clause 1.

> The judicial Power shall extend * * * to Controversies between two or more States;—between a State and Citizens of another State;

Clause 2.

> In all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Section 233 of the Judicial Code provides in part as follows:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * * (Mar. 3, 1911, c. 231, §233, 36 Stat. 1156; 28 U. S. C. A. §341.)

A more detailed analysis of these provisions will be reserved until a later part of this brief. It will suffice for the present to note that clause 1 confers the judicial power, and that clause 2 merely distributes the power conferred under Clause 1. *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553 (1871); *California* v. *Southern Pacific Company*, 157 U. S. 229 (1895); *Louisiana* v. *Texas*, 176 U. S. 1 (1900). Section 233 of the Judicial Code, which is substantially a reenactment of section 13 of the Judiciary Act of 1789 (Sept. 24, 1789, c. 20, § 13, 1 Stat. 80), divides the original jurisdiction conferred on the Supreme Court into

exclusive and non-exclusive jurisdiction, and performs the additional function, by virtue of its differences of phraseology, of assisting in the construction of the constitutional language, as they were almost contemporaneous and probably drafted by the same hands. *Ames* v. *Kansas*, 111 U. S. 449 (1884); *Louisiana* v. *Texas*, *supra*; Cf. *Williams* v. *United States*, 289 U. S. 553 (1933). Of course, the statute could not alter the constitutional assignment of jurisdiction, *Marbury* v. *Madison*, 1 Cr. 137 (1803), much less the grant of judicial power, and therefore the first inquiry will be whether or not the case at bar can qualify as a proceeding to which the judicial power of the United States extends. For it so to qualify (A) it must be a justiciable "case" or "controversy"; (B) it must be a "case" or "controversy" between States, or (C) between a State and citizens of other States, with no citizens of the complaining State indispensable parties respondent; and (D) since it is a suit in equity, it must state a case of equitable cognizance. The Bill of Complaint certainly does not meet all of these essential requirements, and perhaps it can be established that it does not meet any of them.

A. *There is no justiciable "case" or "controversy."*

Clause 1 of Article III, section 2 of the Constitution extends the judicial power to "controversies," while clause 2 distributes the power in terms of "cases." The Judicial Code uses only the word "controversies." This difference of words probably does not, however, imply a distinction:

> The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.
>
> *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239 (1937).

For the purpose of this argument the attack on the bill as not stating a case or controversy will therefore be con-

fined to a demonstration that the bill does not state a justiciable controversy. See *Marbury* v. *Madison*, *supra*; *Muskrat* v. *United States*, 219 U. S. 346 (1911).

(1) *A request for an opinion does not present a case or controversy.*

The prayer in the Bill of Complaint is contained in paragraphs 20, 21 and 22 (pp. 15-16). Paragraph 21 prays only for the issuance of process, and paragraph 22 is a general, formal prayer for "other, further, different and additional relief." Paragraph 21 embraces the only demand for specific relief:

> * * * that this Court may determine, declare and adjudge whether the complainant, the Commonwealth of Massachusetts, or the respondent, the State of Missouri, has the jurisdiction and lawful right to impose transfer, succession or inheritance taxes in respect of said several transfers under the facts and circumstances herein presented, and may determine, declare and adjudge that the complainant has the right and jurisdiction to impose such taxes in respect of all said transfers.

It is difficult to distinguish this prayer from that in the case of *United States* v. *West Virginia*, 295 U. S. 463 (1935), in which the United States asked for a declaration of its right to control the use of a river which it alleged to be navigable and which the respondent State claimed to be non-navigable. The Court said:

> At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable * * *. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259. Until the right asserted is threatened with invasion by acts of the State, which serve both to de-

> fine the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court. 295 U. S. 473-474.

In *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922), the State of Texas asked the Court to declare unconstitutional certain portions of the Transportation Act of 1920, to annul action taken thereunder with respect to Texas railroads, and for an injunction to restrain any further action with respect to such carriers. The Court concluded that Texas was asking it to determine a question of legislative power, namely, whether the Congress had the right to enact this legislation or whether the power over the subject matter was reserved to the States. The Court said that the bill presented an "abstract question of legislative power":

> Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power. 258 U. S. 162.

To the same effect is *New Jersey* v. *Sargent*, 269 U. S. 328 (1926), where the State of New Jersey asked the Court to declare whether New Jersey or the Congress had legislative jurisdiction over certain waters.

In *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), Massachusetts asked that the enforcement of the Maternity Act be enjoined as beyond the power of Congress and an invasion of the State's right of sovereignty. The Court said:

> In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract

questions of political power, of sovereignty, of government. 262 U. S. 484-485.

In each of these four cases a sovereign or quasi-sovereign filed an original bill in this Court asking the Court to determine whether complainant or another sovereign or quasi-sovereign named as respondent (or with its officials named as respondents) had the power under the Constitution to do certain things. In each case the Court held that the proceeding did not present a case or controversy within the judicial power. Massachusetts is likewise only asking for a declaration of whether it as the state of domicile, or Missouri as the state of physical situs and residence of legal title-holders, has the right to levy an inheritance tax, and "this Court may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama* v. *Arizona, supra,* 291 U. S. 286, 291 (1934). "The judicial power does not extend to the determination of abstract questions." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324 (1936). "This Court cannot issue declaratory decrees." *Arizona* v. *California,* 283 U. S. 423, 464 (1931).

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923), a suit to enjoin the enforcement of a West Virginia statute cutting off interstate commerce in West Virginia natural gas, although the Court did take jurisdiction, Mr. Justice Brandeis delivered a strong dissent in the court of which he said:

> The bills present neither a "case" nor a "controversy," within the meaning of the Federal Constitution. *Marbury* v. *Madison,* 1 Cr. 137; *Muskrat* v. *United States,* 219 U. S. 346, 356, 359; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like *McCord* v. *Louisville & Nashville R. R. Co.,* 183 U. S. 483, 495, an attempt to enjoin, not executive action, but legisla-

> tion. They are instituted frankly to secure from this Court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare *Giles* v. *Harris*, 189 U. S. 475, 486. The well settled rule that the Court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a State or a private person. And the rule cannot be overcome by giving to pleadings the form of a bill in equity for an injunction. 262 U. S. 610-611.

That the Commonwealth of Massachusetts is also frankly attempting to secure from this Court a declaration that its taxing power extends to the transfers in question and that the taxing power of the State of Missouri does not so extend is apparent from its prayer for relief. It appears to be willing to stand solely on its right to an opinion from this Court on a question of sovereign power, and that this Court will not furnish such an opinion, in a suit instituted by a State for the sole purpose of obtaining it, seems no longer open to question.

(2) *The supposed dispute is political and therefore not justiciable.*

In spite of the intimation of Mr. Justice Washington in *Fowler* v. *Lindsey*, 3 Dall. 410, 413 (1799), that he could see no reason why a State could not sue in equity "for such an incorporeal right as that of sovereignty and jurisdiction," the law has since that time become well settled to the contrary. Sovereignty and jurisdiction of a State are admittedly political questions, and political questions are not justiciable. *Virginia* v. *West Virginia*, 11 Wall. 39, (1871).

In *Georgia* v. *Stanton*, 6 Wall. 50 (1868), an original bill in equity sought to restrain the enforcement in Georgia of the Reconstruction Acts. The Court said:

> * * * [That] the prayers for relief, call for the judgment of the Court upon political questions, and, upon

> rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the Court. 6 Wall. 77.

Likewise the Court considered that the Commonwealth of Massachusetts was asking for the determination of a political question in *Massachusetts* v. *Mellon, supra.* And in *Kansas* v. *Colorado,* 185 U. S. 125, 141 (1902). the Court suggested that controversies between States "susceptible of adjustment, and not purely political in their nature," were made justiciable by the Constitution.

There is no better established jurisdiction in controversies between States than the jurisdiction of the Court to settle boundary disputes, but it was vigorously asserted at first that a boundary dispute was a political question and therefore not justiciable. Mr. Chief Justice Taney in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 752 (1838), rested his dissent on that proposition and said:

> Contests for rights of sovereignty and jurisdiction between States over any particular territory, are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the Constitution. 12 Pet. 753.

He argued further that the bill of Rhode Island was to protect and enforce the "mere political jurisdiction" of the State, a function which he did not consider as belonging to the Courts. And that the majority of the Court shared the view of the Chief Justice that if sovereignty and jurisdiction had been the primary questions to be determined in

a boundary case, the Court would have had no jurisdiction, because of these questions being political in their nature, and that the Chief Justice differed from the majority of the Court only on the question of whether sovereignty and jurisdiction were dependent and ancillary questions with relation to the main, factual question of the boundary line, or whether they were the primary questions, is indicated by the majority opinion, in which Mr. Justice Baldwin said:

> The locality of that [boundary] line is a matter of fact. * * * Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, * * *. So that great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 12 Pet. 733-734.

Thus the jurisdiction of the Court over boundary disputes only became settled by an acceptance of the premise that a complainant State in a boundary dispute is only seeking the determination of a fact, namely, the boundary line, with sovereignty and jurisdiction on its side of that boundary line as strictly collateral and incidental. By such a test the bill of complaint in the case at bar cannot stand, for it is purely state sovereignty and jurisdiction, the sovereignty and jurisdiction to tax, which the Commonwealth of Massachusetts has asked this Court to determine. Indeed, in the Bill of Complaint it is asserted that jurisdiction to tax is the "primary issue" in the case (p. 15, par. 19). No question of fact is involved, for none of the facts alleged in the Bill of Complaint are disputed, except perhaps the allegation that Missouri proposes to tax to the exclusion of Massachusetts, which is negatived by the alternative plea in Missouri's Return. And in this respect the case differs also from *Texas* v. *Florida, supra*, where the complainant, as in the boundary dispute cases, asked the Court to determine a fact.

B. *There is no case or controversy between States.*

Even if a justiciable controversy is presented, to which the judicial power of the United States extends, this Court's jurisdiction does not attach unless the controversy is between two or more States, or between a State and citizens of other States. First, an attempt will be made to show that the Bill does not present a controversy between two States, and then, under point IC, that it does not present a controversy between a State and citizens of other States. Unless a controversy between at least one of these two sets of adversary parties is presented, this Court cannot take jurisdiction.

(1) *There is no direct conflict of interests between the States.*

According to the Bill of Complaint, the trust assets which Massachusetts seeks to subject to the payment of its inheritance taxes had a market value as of the date of the filing of the Bill of almost two million dollars. Massachusetts claims inheritance taxes in the amount of $137,000, and alleges that Missouri claims inheritance taxes in the amount of approximately $182,000. Maximum federal estate taxes are alleged to be approximately $69,000 (p. 9). It is thus evident that the trust assets are far more than adequate for the payment of the total taxes claimed by both Massachusetts and Missouri. There is, therefore, no question such as was presented in *Texas* v. *Florida, supra,* of adverse claims for taxes in an amount which if collected would deplete the estate to a point which would not leave sufficient assets for the payment of the taxes alleged by complainant to be collectible by it. A comparison of the bill in *Texas* v. *Florida, supra,* with the bill which Texas had previously asked leave to file against the same States, for the same relief, leave to file being denied, *Texas* v. *New York et al.,* 300 U. S. 642 (1937), indicates that this fact was decisive on the jurisdictional issue, as perhaps it

was in the Court's declining to take original jurisdiction in one phase of the Dorrance litigation, *New Jersey* v. *Pennsylvania*, 287 U. S. 580 (1933).

Massachusetts asserts that the respondent trustees who have possession and control of the trust assets are in Missouri and beyond the reach of the process of the courts of Massachusetts. But this does not present a controversy of any kind between the two States. Whether Missouri has or has not the right to tax the transfer in question, and whether Missouri does or does not levy and collect the taxes, will neither assist nor deter the Commonwealth of Massachusetts in the collection of the taxes which it claims it has the right to collect. Missouri cannot compel the trustees to subject themselves to the reach of process issuing out of the Massachusetts courts, and in fact it is a matter of indifference to Missouri whether the trustees can be reached by such process or not. In the last analysis the claims of Massachusetts and Missouri are completely independent, are not mutually exclusive in any way, and Missouri has not done and does not propose to do any act which would tend to interfere with the collection by Massachusetts of its asserted tax. Thus there is no real controversy of any kind between the States.

In *Muskrat* v. *United States*, *supra*, 219 U. S. 346 (1911), the decision turned squarely on an absence of adversary parties. The United States wanted to have the validity of certain Acts of Congress relating to Indian lands determined, and the Congress authorized the bringing of suits in the Court of Claims against the United States, with a right of appeal to the Supreme Court. This Court held that the Court of Claims was without jurisdiction to entertain the suit, on the ground that, as the position of the United States was not adverse to that of the claimant, there was no real controversy:

> The term [case] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. 219 U. S. 357.

(2) *Missouri is not threatening any private or property right of Massachusetts.*

Even if there were a direct conflict or controversy between the States, and if Missouri were threatening to invade in some manner some right of the Commonwealth of Massachusetts, or more specifically, if Missouri by attempting to collect its inheritance taxes with respect to these transfers were interfering with the collection by Massachusetts of its inheritance taxes, it would not seem that such a conflict would present a justiciable controversy between the two States, because the Court has declared that only certain types of state rights will be protected from threatened invasion.

In *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 277 (1911), the State of Oklahoma sought to enjoin the charging of certain freight rates alleged to be discriminatory. The Court said that if the State's contention were to be sustained,

> • • • [then] the Constitution when conferring *original* jurisdiction on this Court "in all cases • • • *in which a State is a party*" (Art. III, § 1), intended to include any and every judicial proceeding of whatever nature which the State may choose to institute, in this court, for the purpose of enforcing its laws, although the State may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. 220 U. S. 286.

And in *Georgia* v. *Stanton*, *supra*, 6 Wall. 50, 77 (1868), the Court dismissed the bill because "no case of private rights or private property infringed, or in danger of actual or threatened infringement" was presented.

In *United States* v. *West Virginia*, *supra*, 295 U. S. 463 (1935), this requirement is more plainly illustrated. The Court said:

> At the outset, it should be noted that the bill • • • neither asks the protection nor alleges the invasion of

> any property right. • • • there is no allegation of any interference by the State, actual or threatened, with any land or property. 295 U. S. 471.

An analysis of that case shows that it turns on the question of an invasion of an actual property right of the United States, as distinguished from an invasion of the general sovereignty of the United States over the particular river in question. The right to tax is an attribute of general sovereignty, as distinguished from a property right. *McCulloch* v. *Maryland*, 4 Wheat. 316, 428 (1819); *The Providence Bank* v. *Billings*, 4 Pet. 514, 564 (1830); *Case of the State Freight Tax*, 15 Wall. 232, 278 (1872); *Cooley on Taxation*, 3rd Ed., p. 7. Thus, even if the Missouri tax threatened in some way the jurisdiction of Massachusetts to tax, such an invasion would not be of a private or property right of Massachusetts, and therefore could not present a justiciable controversy. While the property right requirement has been relaxed in water rights cases so as to permit a State to sue as *parens patriae*, *Missouri* v. *Illinois*, 180 U. S. 208 (1901); *Kansas* v. *Colorado*, 185 U. S. 125 (1902), the water rights cases present no analogy to the case at bar.

(3) *Massachusetts is not the real party in interest.*

As noted above in *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Co.*, 220 U. S. 277 (1911), that a State may file a proceeding in this Court as complainant, does not without more present a justiciable controversy within the Court's jurisdiction.

> Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens • • •.
>
> *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287 (1888).

The fact that the Bill may appear on its face to present a justiciable controversy is not sufficient: "In determining whether this litigation presents a case * * * we are concerned, not with form, but with substance." *Nashville, Chattanooga & St. Louis Railway Co.* v. *Wallace*, 288 U. S. 249, 259 (1933).

This principle is neatly illustrated in the case of *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 220 U. S. 290 (1911), in which the bill sought to enjoin the transportation into Oklahoma of intoxicating liquors. The bill was denominated a bill in equity and asked for equitable relief. And the case turned on the question of whether the suit was of a civil nature so as to come within section 233 of the Judicial Code. Mr. Justice Harlan said that it was evident that the object of the suit was to prevent the violation of Oklahoma's criminal laws, and the bill was dismissed for want of jurisdiction with the following statement:

> Of such a suit this Court cannot take original cognizance, although the suit is in form of a civil nature. 220 U. S. 298.

These cases demonstrate that the Court will inquire into the substance and real object of the suit, regardless of the form the pleadings take, and if Massachusetts is not the real party in interest, the Court has the duty of so declaring, and of declining to take jurisdiction even though the Constitution gives it jurisdiction "In all Cases * * * in which a State shall be Party, * * *" (Art. III, sec. 2, clause 2), because this language, as construed, means that the State must be, not nominally a party, but the real party in interest as complainant. In *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Co., supra*, the Court said:

> We are of the opinion that the words, in the Constitution, conferring original jurisdiction in this Court, in a suit "in which a State shall be a party," are not to be interpreted as conferring such jurisdiction in every

cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally. 220 U. S. 289.

Not many years after the Civil War the idea was conceived of evading the Eleventh Amendment, and of collecting on State bonds by the device of a suit between States in this Court. In *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76 (1883), the Court declared that one State cannot create a controversy with another State within the meaning of that term as used in the Constitution by assuming the prosecution of debts owing by another State to its citizens. *Kansas* v. *United States*, 204 U. S. 331 (1907). See *Florida* v. *Anderson*, 91 U. S. 667 (1875).

In *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900), a somewhat less obvious illustration of this principle came before the Court. Louisiana sought to enjoin the enforcement of Texas quarantine laws, alleging that the Texas quarantine was being enforced in such a way as to discriminate against Louisiana commerce. The Court held that Louisiana was not the real party in interest in the suit, but rather that its citizens whose trade and commerce were injured were the real parties in interest, and therefore that the original jurisdiction of the Court could not be invoked.

A striking illustration of the principle is found in *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923), in which a bill was filed to enjoin further use of drainage ditches alleged to be injuring property in North Dakota by overflowing into the State. Damage was alleged to both public and private property. The Court said that a justiciable controversy was presented insofar as the North Dakota public property was concerned, but that insofar as relief was asked for the benefit of individuals in North Dakota whose property had been damaged, the bill did not present a justiciable controversy.

It is evident from the earlier analysis of Massachusetts' prayer for relief that Massachusetts is not the real party in interest in this proceeding. This is not a suit to collect Massachusetts inheritance taxes, for no such relief is prayed for in the bill. The prayer is for a determination as to whether Massachusetts or Missouri has the right to assess and collect taxes, but as has been demonstrated above, it makes no difference to Missouri whether Massachusetts collects its Massachusetts inheritance taxes or not, and by the same token it makes no difference to Massachusetts whether Missouri collects its taxes or not. The only real parties in interest, who would be in any way affected by the collection of the Missouri tax, are the persons whose property will be used to pay that tax. (Of course, Massachusetts cannot say that the possibility that in a Missouri case the Court will say no other state can tax, entitles Massachusetts to contest the proceeding.) Thus it is evident that the beneficiaries under the trust instruments, either individually or through their representative trustees, are the only persons who are really interested in whether Missouri taxes or not, and Massachusetts cannot invoke the original jurisdiction of this Court by filing a bill as complainant which has as its object the determination of their tax liability.

C. *If there is a separate controversy between a State and citizens of another State, necessary parties are absent, whose joinder would oust the jurisdiction.*

California v. *Southern Pacific Company, supra*, 157 U. S. 228 (1895), involved title to real estate, and the Court came to the conclusion that citizens of California were necessary parties, in whose absence as parties the litigation could not proceed. The Court, to dispose of any attempt to amend the bill, pointed out that the joinder of California citizens as parties defendant would oust the jurisdiction of the Court, and came to the conclusion that the bill must be dismissed. To the same effect is *Arizona* v. *California*,

298 U. S. 558 (1936). See also the dissent of Mr. Chief Justice White in *South Dakota* v. *North Carolina*, 192 U. S. 286, 322 (1904), and the dissent of Mr. Justice Brandeis in *Pennsylvania* v. *West Virginia*, *supra*, 262 U. S. 553, 605 (1923). Thus, in the case at bar, if a citizen of Massachusetts should be a necessary party respondent, the Court must decline to take jurisdiction, even if it should find that a justiciable controversy between Massachusetts and the trustees, or Massachusetts and Missouri, is presented.

It has already been pointed out that the beneficiaries under the trust instrument are the only persons really interested in the issue framed by Massachusetts. They are the only persons whose property rights will be affected by the determination of the question which Massachusetts asks the Court to determine. An examination of the three trust indentures attached to the Bill of Complaint and incorporated in the Bill by reference will show that in each of the three indentures citizens of Massachusetts are beneficiaries. An examination of the terms of the indentures will also show that in the 1921 indenture the trust became substantially a dry trust on the death of the settlor and that the only act remaining to be performed by the trustee with respect to the bulk of the estate, is to distribute legacies to beneficiaries, including these Massachusetts citizens. A determination of the tax with respect to the interests of these Massachusetts citizens should not be made unless they are to have their day in court. As appears from the face of the Bill it would make a substantial difference to them whether Massachusetts or Missouri should be allowed to impose its taxes (if only one of them were to be so allowed), because the asserted Missouri tax is approximately $182,000, while the asserted Massachusetts tax is $137,000, and obviously it would make a great deal of difference to these beneficiaries in the event the Court should decide, looking at the situation as it existed when the proceeding was instituted, that both States have the right to impose their taxes.

Furthermore, the Court in these original proceedings has adhered to a rather broader rule about giving interested parties their day in court than may have been applied in connection with the doctrine of necessary or indispensable parties in strictly private litigation. For example, in *Texas* v. *Interstate Commerce Commission, supra,* 258 U. S. 158 (1922), a suit to nullify parts of the Transportation Act of 1920 as applied to Texas carriers, the Court declined to take jurisdiction and had this to say as to the parties respondent, only the Commission and the Railroad Labor Board being named as such parties in the bill:

> The bill makes it plain that the carriers and employees have put the Board's decisions into effect and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; * * * Their interests would be directly and unavoidably affected. They are not parties to the bill; nor do any of those who are parties represent them. The Board does not claim to do so; and the attitude of the State is antagonistic to them. To take up and solve the controversy without their presence and without their being represented would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 245. If their citizenship be such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence. The cases just cited leave no doubt on this point. 258 U. S. 163.

In *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902), the same attitude was evidenced. That was a suit for an injunction restraining the defendant, a New Jersey corporation, from effecting a consolidation of the Great Northern Railway Company and the Northern Pacific Railway Company, both Minnesota corporations. The Court held that the suit could not be entertained without additional parties, saying that the minority stockholders had a

right to have their interests represented in the controversy by the companies whose stock they held, and that the companies had the duty of protecting the public's interest, which the State was hardly in a position to represent. The Court said:

> Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. 184 U. S. 246.

D. *The allegations afford no adequate basis for relief according to accepted doctrines of equity jurisprudence.*

That the constitutional authority of this Court in original proceedings is dependent on the statement in the bill of complaint of a cause of action which can be classified, if the bill is in equity, as a recognized and established type of equity case, was announced by the Court in *Texas* v. *Florida, supra*, 306 U. S. 398 (1939). It is evident that the Massachusetts Bill represents an effort to qualify it as a bill in the nature of interpleader. However, a comparison between the Massachusetts Bill of Complaint here, and the Texas Bill of Complaint in *Texas* v. *Florida, supra*, demonstrates very plainly certain fundamental differences between the two.

While in a strict bill of interpleader the risk of loss which prompts a court of equity to take jurisdiction is a risk to the complainant as a stakeholder, in that he may be called upon to pay the same debt twice, the only risk of loss to a complainant in a bill in the nature of interpleader is that he as a complainant may have his claim defeated or diminished by "the independent prosecution of rival but mutually exclusive claims." 306 U. S. 407. The Court in *Texas* v. *Florida, supra*, declared that "the risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one" and noted that the equity jurisdiction was "founded on avoidance of the risk

of loss resulting from the threatened prosecution of multiple claims." 306 U. S. 410.

It has already been pointed out that the tax claims of Missouri and Massachusetts are not mutually exclusive. Even if it could be assumed that *Curry* v. *McCanless, supra*, 307 U. S. 357 (1939), announced a rule of law differing from the law as it existed at the time of the institution of this proceeding, and that the Constitution, under the interpretation then in effect, prevented more than one State from assessing inheritance taxes on a single transfer, even then Massachusetts was faced with no possible risk of loss from anything that Missouri might do. If Missouri did levy its tax and this Court had later said that it had a right so to do, and that it was the only State which had that right, the levying of the tax by Missouri would have interfered with no right which Massachusetts had. In other words, the only effect of the Missouri tax would have been to prevent Massachusetts from levying a tax which by hypothesis it had no right to levy. If on the other hand, still assuming that the law was that only one State could tax, this Court had subsequently declared that the Missouri tax as assessed was unconstitutional and that Massachusetts had the sole right to levy the tax, then again Massachusetts ran no risk because the Missouri tax was attempted. And as developments have actually occurred, the Court has declared that both States have the right to levy their respective taxes, so if this third and only remaining hypothesis were accepted as existing law at the date of the institution of the proceedings, here also Massachusetts could run no risk because of any action which the taxing authorities of Missouri might take, because the assets in the hands of the trustees had a market value several times the amount of the combined taxes claimed by the two States. Thus the most essential requirement of a bill in the nature of interpleader, a real risk of loss to the complainant, is negatived by the pleadings, under every possible theory of the law on the date of the filing of the bill.

That Massachusetts has an adequate remedy at law will be discussed under Point III C.

Missouri's counsel have been unable to discover any other kind of case of equitable cognizance under which this case could be classified and thus, under the doctrine announced in *Texas* v. *Florida, supra,* this proceeding cannot be one to which the judicial power extends, and the Court must decline to take jurisdiction.

II.

Even if the Court Has Jurisdiction it May Decline to Exercise it.

A. *Courts need not in every case exercise a jurisdiction which they admittedly possess.*

In *Cohens* v. *Virginia,* 6 Wheat. 264 (1821), Mr. Chief Justice Marshall said

> It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. 6 Wheat. 404.

Similar expressions are found in subsequent cases, *Second Employers' Liability Cases,* 223 U. S. 1, 58 (1912), particularly in connection with federal courts attempting to abandon jurisdiction in favor of state courts, *Hyde* v. *Stone,* 20 How. 170 (1858); *Chicot County* v. *Sherwood,* 148 U. S. 529 (1893); *McClellan* v. *Carland,* 217 U. S. 268 (1910).

However, despite these broad statements, there are a number of cases in which this Court has said that exceptions may be carved out of the general rule, and in which the Court has squarely held that federal courts may in their discretion decline to exercise a jurisdiction admittedly possessed.

One of these exceptions involves admiralty cases between foreigners. Although Article III, section 2 of the Constitution extends the judicial power "to all Cases of admiralty and maritime Jurisdiction" and although section 24, as amended, of the Judicial Code (28 U. S. C. A. § 41 (3)), vests in district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction", it is well settled that in suits in admiralty between foreigners the district courts may in their discretion decline to retain jurisdiction. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

Rogers v. *Guaranty Trust Company of New York*, 288 U. S. 123 (1933), represents another type of case in which the exercise of jurisdiction in discretionary. That case held that a federal court may properly decline to interfere with or control the internal affairs of a corporation organized under the laws of another State. And in *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), it was held that a district court in a receivership case should exercise its discretion and allow State banking authorities to liquidate a bank under State statutes, rather than to carry out the liquidation through the vehicle of a federal receivership, under a jurisdiction which the court admittedly had.

In *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, Mr. Justice Brandeis said:

> Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interests of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more properly be conducted in a foreign tribunal. 245. U. S. 422.

And in *Rogers* v. *Guaranty Trust Company of New York*, *supra*, Mr. Justice Butler said:

> While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. 288 U. S. 130.

Cf. *Douglas* v. *New York, New Haven, & Hartford R. R. Co.*, 279 U. S. 377 (1929), which apparently overrules the *Second Employers' Liability Cases* (*Mondou* v. *New York*) 223 U. S. 1 (1912), which had held that a state court must take jurisdiction of an action brought under the Federal Employers' Liability Act.

Although the case at bar is neither a suit in admiralty between foreigners, nor a suit involving the internal affairs of a corporation, or the liquidation of a state bank, these cases do stand for the proposition that this Court may announce in what cases a federal court may decline to exercise a jurisdiction vested in it by the Constitution or the Congress. This Court must be the final arbiter of the kinds of cases in which jurisdiction may be declined, and it has as much right to declare that jurisdiction may be declined in certain cases where States are parties, as where foreigners are parties.

B. *The Constitutional provision conferring jurisdiction in controversies between States, and between States and citizens of other States, is not mandatory.*

Article III, section 2, clause 1, of the Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, section 2, clause 2 of the Constitution provides as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It has already been observed that clause 2 does not purport to confer any judicial power, but merely to distribute the judicial power conferred under clause 1. *Pennsylvania* v. *Quicksilver Co., supra,* 10 Wall. 553 (1871).

And section 233 of the Judicial Code of 1911 provides as follows:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party.[1]

---

[1] Section 233 of the Judicial Code (28 U. S. C. A., sec. 341, Mar. 3, 1911, c. 231, sec. 233, 36 Stat. 1156) was a reenactment without change of section 687 of the Revised Statutes of 1878. There are minor variations between this language and the language of section 13 of the Judiciary Act of 1789 (Sept. 24, 1789, c. 20, sec. 13, 1 Stat. 80). See *Ames* v. *Kansas, supra,* 111 U. S. 449, 463 (1884); *United States* v. *Louisiana,* 123 U. S. 32 (1887); Hughes, *Federal Practice,* sec. 3021n.

No amendment of the original Judiciary Act provision has been discovered, and the original language more clearly defines the jurisdiction as follows:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, ex-

If the language of the Judiciary Act can properly be used as a contemporaneous interpretation of the constitutional provisions, *Ames* v. *Kansas, supra,* 111 U. S. 449 (1884), it would seem that "all" controversies where a State is a party, the language of the Statute, would have required the reading of the word "all" into the constitutional provision of clause 1 dealing with controversies between States, especially since clause 2 apparently distributes to the Supreme Court jurisdiction in "all" cases in which a State is a party. However, the Court has declined to accept that interpretation, has said that the omission in clause 1 of the word "all" was apparently deliberate, and intended to be a contrast between the classes of cases in clause 1 which are preceded by the word "all", and thus that the judicial power does not extend to all controversies to which the United States is a party, or to all controversies between two or more States, or to all controversies between a State and citizens of another State, but rather only to certain types of those controversies. *Williams* v. *United States, supra,* 289 U. S. 553 (1933). Cf. *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* 220 U. S. 290 (1911).

Not only has the Court declared that the grant of judicial power does not comprehend all controversies between two or more States, or between a State and citizens of other States; it has gone further and has interpreted the constitutional language in such a way that the interpolation of phrases is necessary for an understanding of its scope. And it has read into the constitutional language certain cases not even mentioned. *United States* v. *Texas,* 143

---

cept between a state and its citizens; and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul, shall be a party.

U. S. 621 (1892). It would be particularly difficult to understand Section 2 of Article III or Section 233 of the Judicial Code without a examination of the cases, for the words of section 233 would indicate a jurisdiction considerably different from the jurisdiction which the Court has declared is embraced by its language.

There is no indication either in the constitutional provisions or the Judicial Code that they would not be equally applicable to suits in which States are defendants, as to suits in which States are plaintiffs. In fact, in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), the Court held that it made no difference whether a State was a plaintiff or a defendant. However, even in the absence of the Eleventh Amendment, *Chisholm* v. *Georgia* would probably not be decided that way today, for the Court has approved Mr. Justice Iredell's dissent in that case, and has declared that the doctrine of the implied immunity of a sovereign from suit must be read into the constitutional language, and that its literal construction is inadmissible. *William* v. *United States, supra; Hans* v. *Louisiana*, 134 U. S. 1, (1890).

The last two cases cited involved suits by citizens against sovereigns. The Court has also read into the constitutional provision a prohibition against suits by a foreign State against a State:

> Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent.
>
> *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934). Cf. *Oklahoma* v. *Gulf, Colorado & Santa Fe Railway Co., supra*, 220 U. S. 290 (1911).

In fact, in *Williams* v. *United States, supra,* the Court said that the phrase "Controversies to which the United States shall be a Party" in Article III, section 2, clause I, which it placed upon precisely the same footing as the clause "Controversies between two or more States",

> • • • must be construed, in accordance with the practical construction put upon it by the first Judiciary Act, as though it read, "controversies to which the United States shall be a party plaintiff or petitioner." 289 U. S. 577.

The same principle has been given an even broader application. In *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289 (1888), the Court said:

> The grant is of "judicial power", and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

Cf. *Missouri* v. *Illinois, supra,* 180 U. S. 208 (1901).

It is interesting to note that the Court has grafted a further exception upon the exception that suits which were not justiciable prior to the Constitution were not made justiciable by the Constitution. In *Hans* v. *Louisiana, supra,* the Court said:

> The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines • • •. 134 U. S. 15.

It is also interesting to observe that the interpretation of the Constitution and Judiciary Act as differentiating, although the language itself suggests no such differentiation,

between suits by a State or the United States, and suits against a State or the United States, was arrived at even although in the very language of the Judiciary Act, an express distinction is made between suits by ambassadors and other foreign representatives, and suits against them.

If the language of the Constitution and the Judiciary Act were taken literally in connection with controversies between, for example, a State and citizens of other States, it would appear to authorize the Supreme Court to take jurisdiction in every case where a State and citizens of other States are adversary parties. The Court has, however, interpreted this language so that the grant of power is only considered as extending to justiciable cases or controversies, of a civil nature, in which a State as plaintiff or petitioner sues only citizens of other States. Thus if the Court can read into the language of the Constitution certain exceptions which are perhaps not directly suggested by its terms, but which are derived from postulates beyond the confines of the Constitution, it would appear to be at liberty to decline to exercise jurisdiction in this case, on grounds equally compelling, and on postulates equally beyond the confines of the constitutional and statutory language. Cf. the dissenting opinion of Mr. Chief Justice Fuller in *United States* v. *Texas, supra,* 143 U. S. 621, 648 (1892).

III.

If the Court Has Discretion to Decline to Exercise Jurisdiction it Should Decline to Exercise it in This Case.

A. *The spirit in which interstate litigation should be approached:*

Admittedly the case at bar is not one in which the actualities of the problem which Massachusetts is attempting to present to the Court would be mutilated by the litigous process. Compare the dissenting opinions of Mr. Justice Frankfurter in *Texas* v. *Florida, supra,* 306 U. S. 398, 428 (1939) and of Mr. Chief Justice Taney in *Pennsylvania* v.

Wheeling Bridge Co., 13 How. 518, 579 (1852). Admittedly also the fact that there may not have been heretofore presented to this Court a case precisely like the case at bar is probably immaterial. *Arizona* v. *California*, 292 U. S. 341 (1934). And there is no reason to suppose that if the Court should decide to take jurisdiction there would be any difficulty about the terms or enforcement of a decree, a problem presented in *Kentucky* v. *Dennison*, 24 How. 66 (1861), and *Mississippi* v. *Johnson*, 4 Wall. 475 (1867), suggested in *Virginia* v. *West Virginia*, 246 U. S. 565, (1918), and urged as a reason for declining to take jurisdiction by Mr. Justice Brandeis in his dissenting opinion in *Pennsylvania* v. *West Virginia, supra*, 262 U. S. 553, 605 (1923).

However, this Court has frequently expressed its grave sense of responsibility in connection with interstate conflicts. In *Louisiana* v. *Texas, supra*, 176 U. S. 1, 15 (1900), the Court said:

> But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

And in *Alabama* v. *Arizona*, 291 U. S. 286, 291, (1934), the Court said that

> Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity.

In *New York* v. *New Jersey*, 256 U. S. 296, 309, (1921), the Court said:

> • • • the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

To the same effect are *North Dakota* v. *Minnesota, supra,* 263 U. S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931); *Washington* v. *Oregon,* 297 U. S. 517 (1936).

In these original proceedings the Court has in several cases, in arguments on the jurisdiction alone, declined to take jurisdiction because of no cause of action stated on the merits.

North Dakota v. *Chicago & Northwestern Railway Co.,* 257 U. S. 485 (1922), was instituted by a bill in equity to restrain the defendant railroad companies from applying an order of the Interstate Commerce Commission increasing intrastate rates in North Dakota, until the Supreme Court of the United States had had an opportunity of reviewing the order of the Commission. The defendants questioned the jurisdiction of the Court on the grounds that the United States was not a party, that the United States by statute must be a party to a suit to enjoin an order of the Commission, and that the United States had only consented to be sued in such cases in the district courts. The State's contention was that if it had a substantial right which was being infringed, it had an absolute right under the Constitution to bring this bill in the Supreme Court, a right which could not be taken away by an act of Congress. Mr. Justice Holmes said that even granting the States' premises it did not follow that the bill could be maintained since, the bill being in equity, "the requirements of justice and public policy must be taken into account." 257 U. S. 490. He suggested that there was no doubt that the State could sue in the district court, naming the United States as a party (thus disposing of any question that the case was not one to which the judicial power did actually extend) and that in any event the State would be adequately protected by the right of appeal.

In *Oklahoma* v. *Cook,* 304 U. S. 387 (1938), the Court denied leave to file a bill of complaint, suggesting that if jurisdiction were taken of the suit, an enormous number

of other similar cases against citizens of other States might be brought. Cf. *California* v. *Latimer*, 305 U. S. 255 (1938).

These cases consistently carry out the admonition in *California* v. *Southern Pacific Co.*, *supra*, an admonition which epitomizes the proper approach to the problem of original jurisdiction:

> The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. 157 U. S. 261.

B. *This proceeding is not of the kind for which the original jurisdiction of this Court was designed.*

Counsel will not burden the Court with a discussion of the historical development of interstate controversies. From the early days of Colonial disputes, *Penn* v. *Lord Baltimore*, 1 Ves. 444 (1750), through the provisions of the Articles of Confederation, the Constitutional Convention, and the debates on ratification, the story has already adequately been told. *Rhode Island* v. *Massachusetts*, *supra*, 12 Pet. 657 (1838); *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900); *Missouri* v. *Illinois*, *supra*, 180 U. S. 208 (1901); *South Dakota* v. *North Carolina*, *supra*, 192 U. S. 286 (1904); *Virginia* v. *West Virginia*, 206 U. S. 290 (1907), 246 U. S. 565 (1918); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale Law Journal 685; William C. Coleman, *The State as Defendant under the Federal Constitution*, 31 Harvard Law Review 210. The Court may, however, be interested in a summary classification of the fifty-eight interstate controversies which have been presented to the Court and have been the subject of court opinions.[3]

Most numerous are the cases involving boundary disputes, totalling thirty-three. No question of jurisdiction was raised in the first of these, *New York* v. *Connecticut*, 4

[3] See James Brown Scott, *Judicial Settlement of Controversies between States of the American Union*, Oxford University Press (1918), Oxford at the Clarendon Press (1919).

Dall. 1, 3, 6 (1799). After the jurisdictional problem had been thoroughly argued and settled in *Rhode Island* v. *Massachusetts, supra,* 12 Pet. 657 (1838), upon the theory that boundary disputes were suits asking for a factual determination, with sovereignty and jurisdiction only incidental questions, a conclusion which was reached over Mr. Chief Justice Taney's vigorous dissent, the jurisdictional question was apparently considered settled and has hardly been mentioned in any of the subsequent boundary dispute cases, a list of which is incorporated in the Appendix.

The second most numerous class of cases are those involving the interstate flow of water. These cases number fourteen. Some complain of the flow, as of a trespass or nuisance, such as *Missouri* v. *Illinois, supra,* 180 U. S. 208 (1901), in which the jurisdiction of the Court for this class of case was first vigorously contested and settled.[3] Others, such as *Kansas* v. *Colorado, supra,* 185 U. S. 125 (1902), complain of an interference with the flow. A list of these cases is incorporated in the Appendix.

A third class are cases involving contractual obligations of States. There are only five of these, three of them being suits on State bonds, *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana, supra,* 108 U. S. 76 (1883), and *South Dakota* v. *North Carolina, supra,* 192 U. S. 286 (1904); one a suit to settle the apportionment of a public debt growing out of the separation of West Virginia from Virginia, *Virginia* v. *West Virginia, supra,* 206 U. S. 290 (1907); and the fifth, *Kentucky* v. *Indiana,* 281 U. S. 163 (1930), involving a State contract to build an interstate bridge.

The fourth class of cases are those in which a State has sought to restrain proceedings under the laws of another

[3] The first case of this class was *South Carolina* v. *Georgia,* 93 U. S. 4 (1876), in which, as in the first boundary case, no question was raised as to the Court's jurisdiction. The parallel between the two classes of cases continued, in that after the jurisdictional issue was once thoroughly considered and disposed of in the second case filed, the later cases generally accepted as a matter of course the jurisdiction of the Court over the subject matter.

State. There are only four of these. *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900), sought to restrain executive action, in the administration of admittedly valid quarantine laws. *Iowa* v. *Slimmer et al.*,* 248 U. S. 115 (1918), sought to restrain judicial proceedings under admittedly valid probate laws. *Pennsylvania* v. *West Virginia*, *supra*, 262 U. S. 553 (1923), and *Alabama* v. *Arizona*, *supra*, 291 U. S. 286 (1934), attempted to block State legislation, although *Pennsylvania* v. *West Virginia*, *supra*, might more properly be classed with the cases of physical diversion under class two above, differing principally from those cases, insofar as subject matter is concerned, only in the commodity diverted.

The two remaining cases would not seem to fit in any classification, one of them, *Arizona* v. *California*, 292 U. S. 341 (1934), being a bill to perpetuate testimony, and the other, *Texas* v. *Florida*, *supra*, 306 U. S. 398 (1939), being a suit for the determination of the fact of domicile.

From all of these interstate controversy cases there emerge two suggested reasons for the jurisdiction of the Court over interstate controversies. The case at bar does not come within either of these two reasons. One is that because the Constitution deprived the States of their sovereign right to adjust their controversies with other sovereigns by diplomacy, or, that failing, by war, it was necessary to provide in the constitutional scheme some tribunal to which these controversies could be carried. *Missouri* v. *Illinois*, *supra*, 180 U. S. 208 (1901), *North Dakota* v. *Minnesota*, *supra*, 263 U. S. 365 (1923). And the principle of some cases being intended to be made justiciable which would not have been justiciable prior to the Constitution is to be confined to this type of controversy. *Hans* v. *Louisiana*, *supra*, 134 U. S. 1 (1890). The second reason for giving this Court jurisdiction, particularly of suits between a State and citizens of other States, was to avoid the supposed partiality

* Perhaps more properly designated *Iowa* v. *Minnesota*, because the State of Minnesota was a party defendant.

of the courts of the State whose citizens might be sued there by another State. *Wisconsin* v. *Pelican Ins. Co., supra,* 127 U. S. 265 (1888). That proposition would not be applicable in the case at bar if the trustees have their remedy in a State or Federal district court, as will be discussed below, and in any event, regardless of the forum or parties, it is not proper to make the assumption that state or local federal courts will make findings dictated solely by financial advantages to the locality. See Mr. Justice Frankfurter's dissent in *Texas* v. *Florida, supra.* If the presumption of judicial fairness and impartiality is to be made even in the presence of a temptation of financial advantage, *a fortiori* it must be made where no financial advantage can accrue or no disadvantage result from the Court's action, as in the case at bar where it is a matter of indifference to Missouri whether the Massachusetts tax is assessed or not, and *vice versa.*

C. *There are other entirely adequate remedies available to the interested parties.*

Although there are ample precedents for the proposition that a court does not take jurisdiction merely because there is no other court which could afford a remedy, *California* v. *Southern Pacific Co., supra,* 157 U. S. 229 (1895), it seems plain that there are other remedies in other courts which are entirely adequate to dispose of any possible differences between the parties interested in this case.

In the first place, it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a Federal district court in Missouri. That such a suit would be of a civil nature and would present a justiciable case or controversy was settled by the decision in *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268 (1935). Admittedly that case did not decide that such a suit could be brought in a state court on a tax before it was reduced to judgment, but

the language of the opinion would certainly admit the construction that such a suit could be brought.

Under the Massachusetts statute the Missouri trustees and beneficiaries are made liable for the payment of the Massachusetts tax. Massachusetts General Laws (Tercentenary Edition 1932) c. 65, sec. 6. It is hardly to be assumed that the trustees would make transfers to the beneficiaries without attempting to get their liability for the Massachusetts tax adjudicated, and that such a possibility can be taken into account by the Court in determining whether or not to take jurisdiction was expressed in *Alabama* v. *Arizona, supra,* where the Court suggests that the bill fails to show

> * * * that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. 291 U. S. 292.

See also the suggestion in *California* v. *Latimer, supra,* where the Court says:

> For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested. 305 U. S. 262.

There is no question about the remedies available for a testing of the validity of the Missouri tax. The trustees could sue to enjoin the collection of the Missouri tax on the ground that it is unconstitutional as applied to them, *Ex parte Young,* 209 U. S. 123 (1908). The trustees could bring an action under the Missouri Declaratory Judgment Act, Laws of Missouri 1935, pp. 218-220.[5] And in the Mis-

[5] Section 1. The Circuit Courts and Courts of Common Pleas of this State, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * * The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

souri inheritance tax laws there is a special section permitting persons interested in their liability for an inheritance tax to bring suit against the State to quiet title, to the bringing of which suit the State expressly consents. Revised Statutes of Missouri, 1929, sec. 598.[6]

Although *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937), held that an adjudication of this kind could not be obtained in an interpleader suit in which the officials of States were named as defendants, because such a suit would violate the Eleventh Amendment, that persons in the dilemma of these trustees and beneficiaries could find other adequate remedies was demonstrated in the cases of *Curry* v. *McCanless, supra*, 307 U. S. 357 (1939), and *Graves* v. *Elliott, supra*, 307 U. S. 383 (1939).

The Massachusetts statutes provide that the State Tax Commissioner may proceed to assess the Massachusetts inheritance taxes, and any interested person is given the right to appeal from the Commissioner's determination.[7] Pre-

---

Section 2. Any person interested * * * whose rights, status or other legal relations are affected by a statute, * * * may have determined any question of construction or validity arising under the * * * statute * * * and obtain a declaration of rights, status, or other legal relations thereunder.

[6] Section 598. Actions may be brought against the State for the purpose of quieting the title to any property, against the lien or claim of lien of any tax or taxes under this article, or for the purpose of having it determined that any property is not subject to any lien for taxes under this article. In any such action, the plaintiffs may be any administrator, or executor * * * or trustee * * * or distributee * * *.

[7] General Laws of Massachusetts (Tercentenary Edition, 1932), c. 65, sec. 25. The value of the property upon which the tax is computed shall be determined by the commissioner and notified by him to the persons by whom the tax is payable, and such determination shall be final unless the value so determined shall be reduced by proceedings as herein provided. At any time within three months after such determination, any party interested in the succession, or the executor, administrator or trustee, may appeal from the decision to the board of tax appeals. Said board shall appraise such property at its value as of the date of the death of the decedent, shall give notice of its decision to the commissioner and to the ap-

sumably the trustees and beneficiaries, particularly the beneficiaries who are residents of Massachusetts, would not permit such a determination to stand against them even if they considered it temporarily uncollectable, when they are given by the statute an adequate opportunity of a judicial review. The trustees and beneficiaries thus have ample opportunities to contest the Massachusetts tax.

If this case does present a real controversy between the States it is certainly a controversy which should be susceptible of amicable adjustment. In fact, in the case of *Louisiana* v. *Texas, supra,* 176 U. S. 1 (1900), this Court suggested that where it appeared from the record that no attempt had been made at amicable adjustment, an inference existed that there was no real controversy between the States. That this Court favors the amicable settlement of disputes has been pointed out on numerous occasions. *Washington* v. *Oregon,* 214 U. S. 205 (1909); *Minnesota* v. *Wisconsin,* 252 U. S. 272 (1920); *New York* v. *New Jersey, supra,* 256 U. S. 296 (1921). And Mr. Justice Holmes in making such a suggestion in *Virginia* v. *West Virginia,* 220 U. S. 1 (1911), said:

> * * * This case is one that calls for forbearance upon both sides. Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end. 220 U. S. 36.

See also Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale Law Journal 685.

---

pellant, and shall make return thereof to the probate court. Such return, when accepted by said court, shall be final except that any party aggrieved by such appraisal shall have an appeal on matters of law.

CONCLUSION.

Counsel for the State of Missouri have attempted to demonstrate that the Court has no jurisdiction, that even if it has jurisdiction, it need not exercise it, and that if it need not exercise it, this is a case where it should not be exercised. Implicit in the whole argument is an attitude toward the function of this Court in our system of government. If, as counsel believe, its chief function is the decision of great causes, and the interpretation of the Constitution which determines the very existence of our system of government, then if the Court under the Constitution can reasonably be spared the harassments of a *nisi prius* court in small causes, it should be spared them. If Mr. Chief Justice Marshall's statement that where the jurisdiction is based on the character of the parties, the nature of the case is nothing, *Cohens* v. *Virginia*, were literally followed, what would prevent the State of Virginia from suing in this Court to collect every delinquent ten dollar tax judgment which transient residents had incurred, and moved away without paying? That such a suit would be justiciable seems hardly open to question. *South Dakota* v. *North Carolina; Milwaukee County* v. *M. E. White Co.;* Cf. *Texas* v. *Florida.* No suggestion is, of course, contemplated that the instant case is in any way comparable to the illustration, but a timely *caveat* to States as suitors might clarify a situation which is at present none too clear. No more cogent reason could exist for the declining of jurisdiction than a preservation of the Court for the major function for which it was designed, by the elimination from its jurisdiction of cases for which it was surely not designed.

It is respectfully submitted that the Motion for Leave to File the Bill of Complaint should be denied, and the cause dismissed.

ROY MCKITTRICK,
Attorney General of the
State of Missouri.

EDWARD H. MILLER,
Counsel for Respondent
State of Missouri.

APPENDIX.

I. Boundary Disputes:

New York v. *Connecticut, et al.*, 4 Dall. 1, 3, 6, (1799);
New Jersey v. *New York*, 3 Pet. 461 (1830), 5 Pet. 284 (1831), 6 Pet. 323 (1832);
Rhode Island v. *Massachusetts*, 7 Pet. 651 (1833), 11 Pet. 226 (1837), 12 Pet. 657 (1838), 12 Pet. 755 (1838), 13 Pet. 23 (1839), 14 Pet. 210 (1840), 15 Pet. 233 (1844), 4 How. 591 (1846);
Missouri v. *Iowa*, 7 How. 660 (1849), 10 How. 1 (1851);
Florida v. *Georgia*, 11 How. 293 (1851), 17 How. 478 (1855);
Alabama v. *Georgia*, 23 How. 505 (1860);
Virginia v. *West Virginia*, 11 Wall. 39 (1871);
Missouri v. *Kentucky*, 11 Wall. 395 (1871);
Indiana v. *Kentucky*, 136 U. S. 479 (1890), 159 U. S. 275 (1895), 163 U. S. 520 (1896), 167 U. S. 270 (1897);
Nebraska v. *Iowa*, 143 U. S. 359 (1892), 145 U. S. 519 (1892);
Iowa v. *Illinois*, 147 U. S. 1 (1893), 151 U. S. 238 (1894), 202 U. S. 29 (1906);
Virginia v. *Tennessee*, 148 U. S. 503 (1893), 158 U. S. 267 (1895);
Missouri v. *Iowa*, 160 U. S. 688 (1896), 165 U. S. 118 (1897);
Tennessee v. *Virginia*, 177 U. S. 501 (1901), 190 U. S. 64 (1903);
Missouri v. *Nebraska*, 196 U. S. 23 (1904), 197 U. S. 577 (1905);
Louisiana v. *Mississippi*, 202 U. S. 1 (1906);
Washington v. *Oregon*, 211 U. S. 127 (1908), 214 U. S. 205 (1909);
Missouri v. *Kansas*, 213 U. S. 78 (1909);
Maryland v. *West Virginia*, 217 U. S. 1 (1910), 217 U. S. 577 (1910), 225 U. S. 1 (1912);
North Carolina v. *Tennessee*, 235 U. S. 1 (1914), 240 U. S. 652 (1916);
Arkansas v. *Tennessee*, 246 U. S. 158 (1918), 247 U. S. 461 (1916), 269 U. S. 152 (1925), 271 U. S. 629;

Arkansas v. *Mississippi*, 250 U. S. 39 (1919), 252 U. S. 344 (1920), 256 U. S. 28 (1921);
Minnesota v. *Wisconsin*, 252 U. S. 273 (1920), 254 U. S. 14 (1920), 258 U. S. 149 (1922);
Oklahoma v. *Texas*, 252 U. S. 372 (1920), 253 U. S. 465 (1920), 254 U. S. 280, 609, 615 (1920), 254 U. S. 603 (1921), 256 U. S. 70, 602 (1921), 257 U. S. 308, 609, 611, 616 (1921), 257 U. S. 621 (1922), 258 U. S. 574, 606 (1922), 259 U. S. 565 (1922), 260 U. S. 705 (1922), 260 U. S. 606, 711 (1923), 261 U. S. 340, 345, 606 (1923), 262 U. S. 505, 724 (1923), 263 U. S. 681 (1923), 264 U. S. 565 (1924), 265 U. S. 76, 490, 493, 500, 505, 513, 573 (1924), 266 U. S. 298, 303, 583 (1924), 266 U. S. 546 (1925), 267 U. S. 7, 452, 580, 582 (1925), 268 U. S. 252, 472, 675, 676, 678, 680 (1925), 269 U. S. 536 (1925), 269 U. S. 314, 539 (1926), 272 U. S. 21 (1926), 273 U. S. 93 (1927), 274 U. S. 713, 714 (1927);
Georgia v. *South Carolina*, 253 U. S. 477 (1920), 257 U. S. 516 (1922), 259 U. S. 572 (1922);
New Mexico v. *Texas*, 264 U. S. 574 (1924), 266 U. S. 586 (1924), 267 U. S. 583 (1925), 271 U. S. 650 (1926), 274 U. S. 716 (1927), 275 U. S. 279 (1927), 276 U. S. 557, 558 (1928), 283 U. S. 788 (1931), 51 S. Ct. 357 (1931);
Louisiana v. *Mississippi*, 268 U. S. 678 (1925), 282 U. S. 458 (1931), 283 U. S. 791 (1931), 290 U. S. 590 (1933);
New Mexico v. *Colorado*, 267 U. S. 30 (1925), 268 U. S. 108 (1925);
Michigan v. *Wisconsin*, 270 U. S. 295 (1926), 272 U. S. 398 (1926);
Massachusetts v. *New York, et al.*, 271 U. S. 65, 636 (1926);
Wisconsin v. *Michigan*, 287 U. S. 571 (1932), 288 U. S. 588, 594 (1933), 295 U. S. 455 (1935), 297 U. S. 547 (1936);
Vermont v. *New Hampshire*, 289 U. S 593 (1933), 290 U. S. 589, 602 (1933), 290 U. S. 579, 605 (1934), 298 U. S. 642 (1936), 299 U. S. 519 (1936), 300 U. S. 636 (1937);
New Jersey v. *Delaware*, 291 U. S. 361, 648 (1934), 295 U. S. 694 (1935), 304 U. S. 590 (1938).

II. Water Rights Cases:

South Carolina v. *Georgia, et al.*, 93 U. S. 4 (1876);
Missouri v. *Illinois and the Sanitary District of Chicago*, 180 U. S. 208 (1901), 200 U. S. 496 (1906), 202 U. S. 598 (1906);
Kansas v. *Colorado*, 185 U. S. 125 (1902), 206 U. S. 46 (1907);
Wyoming v. *Colorado*, 243 U. S. 622 (1917), 259 U. S. 419, 496 (1922), 260 U. S. 1 (1922);
New York v. *New Jersey and the Passaic Sewage Commissioners*, 249 U. S. 202 (1919), 256 U. S. 296 (1921);
North Dakota v. *Minnesota*, 256 U. S. 220 (1921), 263 U. S. 365 (1923), 263 U. S. 583 (1924);
Wisconsin, et al. v. *Illinois and Sanitary District of Chicago, et al.*, 270 U. S. 634 (1926), 271 U. S. 650 (1926), 273 U. S. 642, 644 (1926), 278 U. S. 367 (1929), 281 U. S. 179, 696 (1930), 287 U. S. 568, 578 (1932), 288 U. S. 587, 594 (1933), 289 U. S. 395, 710 (1933);
Connecticut v. *Massachusetts*, 282 U. S. 660 (1931), 283 U. S. 789 (1931);
New Jersey v. *New York, et al.*, 283 U. S. 336, 473, 805 (1931), 284 U. S. 585 (1931), 289 U. S. 712 (1933), 290 U. S. 237 (1933), 296 U. S. 259 (1935);
Arizona v. *California, et al.*, 283 U. S. 423 (1931);
Washington v. *Oregon*, 283 U. S. 801 (1931), 52 S. Ct. 456 (1932), 288 U. S. 592 (1933), 297 U. S. 517 (1936);
Wyoming v. *Colorado*, 286 U. S. 494 (1932), 287 U. S. 579 (1932), 298 U. S. 573 (1936);
Nebraska v. *Wyoming*, 295 U. S. 40 (1935), 296 U. S. 542, 548, 553 (1935), 299 U. S. 510 (1936), 304 U. S. 545 (1938);
Arizona v. *California, et al.*, 298 U. S. 558 (1936), 299 U. S. 618 (1936).

III. Contractual Obligations of States:

New Hampshire v. *Louisiana, et al.*, 108 U. S. 76 (1883);
New York v. *Louisiana*, 108 U. S. 76 (1883);
South Dakota v. *North Carolina*, 192 U. S. 286 (1904);

Virginia v. *West Virginia*, 206 U. S. 290 (1907), 209 U. S. 514 (1908), 220 U. S. 1 (1911), 222 U. S. 17 (1911), 231 U. S. 89 (1913), 234 U. S. 117 (1914), 238 U. S. 202 (1915), 241 U. S. 531 (1916), 246 U. S. 565 (1918);
Kentucky v. *Indiana, et al.*, 281 U. S. 163, 700 (1930), 302 U. S. 640 (1937).

IV. Suits to Restrain Official Action:

Louisiana v. *Texas*, 176 U. S. 1 (1900);
Iowa v. *Slimmer, et al.*, 248 U. S. 115 (1918);
Pennsylvania v. *West Virginia*, 252 U. S. 563 (1920), 257 U. S. 620 (1922), 262 U. S. 553 (1923), 262 U. S. 623 (1923), 263 U. S. 350, 671 (1923);
Alabama v. *Arizona, et al.*, 291 U. S. 286 (1934).

V. Miscellaneous:

Arizona v. *California, et al.*, 292 U. S. 341 (1934);
Texas v. *Florida, et al.*, 306 U. S. 398 (1939).